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No. 87-455

In the Supreme Court of the United States

OCTOBER TERM, 1987

RAFFI NAKASHIAN, A/K/A "RALFI," PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioner argues that the indictment filed against him is multiplicitous because it charges, based on the same facts, both an offense under the general federal conspiracy statute and offenses under more specific drug-conspiracy statutes.

1. On October 30, 1985, petitioner was indicted by a grand jury in the United States District Court for the Southern District of New York. In addition to four counts of perjury, the indictment charged that petitioner conspired to import hashish into this country, in violation of 21 U.S.C. 952(a) and 963 (Count 1); conspired to distribute hashish and to possess hashish with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846 (Count 2); and conspired to make false statements to United States Customs Service officials and to defraud the United States by impeding the collection of information concerning the movement of United States currency, in violation of 18 U.S.C. 371 and 1001 (Count 3). Prior to trial, the district court found that the indictment was

multiplicitous and ordered the government to dismiss either Count 3 or both Counts 1 and 2. On the government's appeal pursuant to 18 U.S.C. 3731, the court of appeals reversed and reinstated all three conspiracy counts (Pet. App. 1a-10a).

The indictment alleged that petitioner participated in the charged importation and distribution conspiracies through the receipt of more than $6 million as partial payment for 20 tons of hashish that was smuggled into the United States. The indictment also alleged that petitioner filed a Customs Form 4790 on approximately September 29, 1980, that falsely stated that he brought into this country $1,972,000 in United States currency. Except for certain acts not involving petitioner, Counts 1 through 3 alleged the same overt acts. Pet. App. 3a-4a, 46a.

Prior to trial, petitioner moved to dismiss the indictment, alleging, among other things, that the three conspiracy counts were multiplicitous. Petitioner conceded, and the district court found, that there was no multiplicity problem with respect to the two drug conspiracies (Counts 1 and 2). Pet. App. 35a-36a. The court concluded, however, that petitioner could not be punished both for those drug conspiracies (Counts 1 and 2) and for the conspiracy charged in Count 3.

The court acknowledged that the three conspiracy charges were brought under separate statutes, that each statute unambiguously authorizes punishment for its violation, and that the offenses defined by the statute are distinct under the test of *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), in that each requires proof of a fact not required by the others (Pet. App. 39a-42a). Nevertheless, the court concluded that it "must look beyond the statutory elements to the specific allegations and objectives of each conspiracy alleged" (*id.* at 42a), at least where, as here, the offenses charged are violations of gen-

eral and specific conspiracy statutes (*id.* at 43a). The court determined that the Count 3 conspiracy overlapped with the conspiracies charged in the first two counts, because the objects of the conspiracies and the overt acts involving petitioner were the same in all three counts (*id.* at 45a-47a). The district court then ordered the government to elect to proceed either on the two drug conspiracy counts or on Count 3 (*id.* at 47a-48a).

The government appealed, and the court of appeals reversed. The court ruled that the district court had erred in finding multiplicity based on the overlap of the specific factual allegations, even in a " 'general conspiracy-specific conspiracy' " case. Pet. App. 6a-7a. The inquiry required by this Court's decision in *Albernaz* v. *United States*, 450 U.S. 333 (1981), the court noted, was whether Congress intended to authorize multiple punishments for the same conduct, and an affirmative answer is presumed where separate statutes are involved and those statutes define different offenses under the *Blockburger* test (Pet. App. 6a). Here, the court observed, "the *Blockburger* test is satisfied whether the statutes are looked at in the abstract or as applied in the indictment" (*id.* at 8a). Thus, as the district court concluded (*id.* at 40a-41a), the statutory elements of 21 U.S.C. 846 and 963 (Counts 1 and 2) differ from those of 18 U.S.C. 371 (Count 3). Pet. App. 8a. Moreover, Counts 1 and 2 of the indictment in this case require proof of conspiracies to import, distribute, or possess with intent to distribute hashish, which need not be proved under Count 3; and Count 3 requires proof of a conspiracy involving the submission of certain false currency information to the United States, which need not be proved under Count 1 or 2 (*id.* at 8a-9a). Since nothing in any relevant legislative history rebuts the presumption that multiple punishments were authorized by Congress (*id.* at 9a-10a), the court held that petitioner could constitutionally be

punished for all three offenses and remanded the case for trial (*id.* at 10a).

2. Petitioner contends (Pet. 7-9) that his double jeopardy rights were violated by the court of appeals' refusal to analyze his multiplicity claim by looking at the factual allegations of the conspiracy counts involved here. Whatever the merits of petitioner's contention, it is not currently ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to dismiss. In that event, no appeal could have been taken because the double jeopardy right petitioner asserts is only the right not to be punished twice for the same offense; there is no double jeopardy bar to trying a defendant on multiplicitous counts. See, *e.g.*, *Ohio* v. *Johnson*, 467 U.S. 493, 500 (1984). If petitioner is acquitted—either on all three counts, on Counts 1 and 2, or on Count 3—following a trial on the merits, his contention will be moot. If, on the other hand, petitioner is convicted on Count 3 and on either Count 1 or 2, and his convictions are affirmed on appeal, he will then be able to present his contention to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

NOVEMBER 1987

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* Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

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